

ORIGINAL

FILED

August 25 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
a Montana limited partnership;)
PLAINS GRAINS INC., a Montana corporation;)
ROBERT E. LASSILA and EARLYNE A.)
LASSILA; KEVIN D. LASSILA and)
STEFFANI J. LASSILA; KERRY ANN)
(LASSILA) FRASER; DARYL E. LASSILA)
and LINDA K. LASSILA; DOROTHY LASSILA;)
DAN LASSILA; NANCY LASSILA)
BIRTWISTLE; CHRISTOPHER LASSILA;)
JOSEPH W. KANTOLA and MYRNA R.)
KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
INC., a Montana corporation; MEADOWLARK)
FARMS, a Montana partnership; JON C.)
KANTOROWICZ and CHARLOTTE)
KANTOROWICZ; JAMES FELDMAN and)
COURTNEY FELDMAN; DAVID P. ROEHM)
and CLAIRE M. ROEHM; DENNIS N. WARD)
and LaLONNIE WARD; JANNY KINION-MAY;)
C LAZY J RANCH; CHARLES BUMGARNER)
and KARLA BUMGARNER; CARL W.)
MEHMKE and MARTHA MEHMKE; WALTER)
MEHMKE and ROBIN MEHMKE; LOUISIANA)
LAND & LIVESTOCK, LLC., a limited liability)
corporation; GWIN FAMILY TRUST,)
U/A DATED SEPTEMBER 20, 1991;)
FORDER LAND & CATTLE CO.; WAYNE W.)
FORDER and DOROTHY FORDER;)
CONN FORDER and JEANINE FORDER;)
ROBERT E. VIHINEN and PENNIE VIHINEN;)
VIOLET VIHINEN; ROBERT E. VIHINEN,)
TRUSTEE OF ELMER VIHINEN TRUST;)
JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
TRUSTEES OF THE JAYBE D. FLOYD LIVING)
TRUST; ROBERT M. COLEMAN and HELEN)
A. COLEMAN; GARY OWEN and KAY OWEN;)
RICHARD W. DOHRMAN and ADELE B.)
DOHRMAN; CHARLES CHRISTENSEN)
and YULIYA CHRISTENSEN; WALKER)
S. SMITH, JR. and TAMMIE LYNNE SMITH;)
MICHAEL E. HOY; JEROME R. THILL; and)

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CLERK OF THE SUPREME COURT
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ORIGINAL

MONTANA ENVIRONMENTAL)
INFORMATION CENTER, a Montana)
nonprofit public benefit corporation,)
)
Appellants,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS OF)
CASCADE COUNTY, the governing body of)
the County of Cascade, acting by and through)
Peggy S. Beltrone, Lance Olson and)
Joe Briggs,)
)
Appellees.)
)
and)
)
SOUTHERN MONTANA ELECTRIC)
GENERATION and TRANSMISSION)
COOPERATIVE, INC.; the ESTATE OF)
DUANE L URQUHART; MARY URQUHART;)
SCOTT URQUHART; and LINDA URQUHART,)
)
Appellees/Cross-Appellants.)

**RESPONSE MEMORANDUM OF APPELLEES/CROSS-APPELLANTS
SOUTHERN MONTANA ELECTRIC GENERATION AND TRANSMISSION
COOPERATIVE, INC. AND URQUHARTS RE: MOTION OF APPELLANTS
FOR SUSPENSION OF RULES**

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Appellants SME/Urquharts*

INTRODUCTION

Appellants (Plains Grains, *et al.*) have requested the Court to suspend its operating rules under Rule 29, M.R.App.P., in the interest of expediting the decision in this appeal. While no litigant before this Court would argue against expeditious determination of an appeal, Appellants have not requested nor suggested any specific method of expediting this appeal.

Appellees/Cross-Appellants Southern Montana Electric Generation and Transmission Cooperative, Inc. and the Urquharts agree that this case should be expedited and suggest that the Court first address the *threshold* issue of mootness of this appeal, which is presented in the Motion to Dismiss Appeal on Grounds of Mootness, filed by Appellees/Cross-Appellants this same date.

THE APPELLANTS FAILED TO REQUEST A STAY OF THE DECISION TO GRANT THE REZONING APPLICATION AND THE PROPERTY HAS BEEN TRANSFERRED

As this Court noted in its Order remanding this matter to the district court, dated April 28, 2009 (copy attached), the Appellants “can decide whether to appeal and whether to seek a stay of the District Court’s final judgment or an injunction pending appeal. Plains Grains first must file with the District Court any request for a stay or an injunction pending appeal. ... This Court retains the authority to review any decision by the district court regarding the stay of execution of a judgment or the denial or granting of an injunction pending appeal.” (Order at 5). The Supreme Court’s Order of April 28, 2009, was certainly a clear warning to Plains Grains of the availability of procedures to request a stay. More importantly, this Court has held, in several recent decisions, that the failure to request a stay and the subsequent transfer of property renders objections to rezoning or subdivision decisions moot.

This litigation has its genesis in an application to rezone property owned by the Urquhart family. Rezoning was granted by the County Commissioners and affirmed by the district court. After the rezoning was granted by the County Commissioners and during the appeal by Plains Grains to the district court, the property was sold by the Urquhart family to Southern Montana. Plains Grains did not request a stay of the grant of the rezoning application from the district court although the rules allow for a motion or request to stay.

The Cascade County Commissioners approved the rezoning application March 11, 2008. Plains Grains waited until the thirtieth day after the grant of rezoning to appeal the decision to the district court. The property was sold by the Urquharts to Southern Montana on August 25, 2008, during the pendency of Plains Grains’ appeal to

the district court, and the deeds were recorded August 26, 2008. (**See** Copies of Deeds, attached to Motion to Dismiss Appeal on Grounds of Mootness, filed this same date).¹

The district court affirmed the grant of the rezoning application on November 28, 2008. Plains Grains filed a notice of appeal, and has not requested a stay—despite the clear admonition by this Court of the available procedure. A cross-appeal was filed by Appellees/Cross-Appellants Southern Montana and the Urquharts and one of the issues raised by cross-appeal is the *threshold* issue of mootness.

In addition to the purchase of the property, a substantial investment of millions of dollars has been made in the commencement of construction as well as other necessary appurtenances, including developing a water supply and a traffic mitigation plan, securing at great expense space on the transmission grid and the actual pouring of concrete foundations, all of which have been accomplished since the grant of the rezoning application.

Appellee/Cross-appellant Southern Montana is a member-owned rural electrical cooperative association which serves over 40,000 Montanans. Southern Montana, **subsequent** to the approval of the rezoning application, purchased the property from the Urquhart family and has invested millions of dollars in moving this project forward.

Plains Grains has sat on its rights and did not request a stay in the face of the following line of authority and the express Order of this Court setting out in detail the procedure for moving for a stay to preserve the status quo. The following cases confirm that the failure to move for a stay and subsequent sale of the property renders the

¹ The deeds were filed with the district court, on August 27, 2008, in support of Appellees/Cross-Appellants' Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment (Dist. Ct. Docket No. 24).

appeal moot:

- ***In re Marriage of Gorton and Robbins***, 2008 MT 123, ¶ 16, 342 Mont. 537, 182 P.3d 746) (citing ***Povsha***, *supra*) (Mootness is a threshold issue which must be resolved first.).
- ***Turner v. Mt. Engr. and Constr., Inc.***, 276 Mont. 55, 915 P.2d 799 (1996) (The failure of a party to seek a stay renders the matter in controversy moot.).
- ***Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, 340 Mont. 239, 173 P.3d 1188 (The failure to ask for a stay of a subdivision approval and the subsequent sale of the property rendered the challenge to the subdivision approval moot.).
- ***Povsha v. City of Billings***, 2007 MT 353, 340 Mont. 346, 174 P.3d 515 (Appeal of zoning change and subdivision approval was dismissed by Supreme Court for mootness when in absence of a stay the building permit was issued and development commenced.).
- ***Mills v. Alta Vista Ranch, LLC***, 2008 MT 214, 344 Mont. 212, 187 P.3d 627 (Supreme Court reaffirmed ***Turner*** and again warned litigants that failure to seek a stay is fatal to a district court action seeking a writ of mandamus or judicial review when the property at issue has changed hands.).
- ***City of Whitefish v. Bd. of County Commrs. of Flathead County***, 2008 MT 436, ¶ 23, 347 Mont. 490, 199 P.3d 201 (“Notably, we chided the applicants in both ***Povsha*** and ***Henesh*** for failing to appeal the district court’s denial of the request for injunctive relief or for failing to seek a stay of proceedings until the

parties could reach a resolution on the merits. We explained that we could not restore the parties to their original positions once the challenged conduct had occurred.").

Litigants have been warned on no less than five occasions by this Court that the failure to move for a stay may render the matter in controversy moot. Plains Grains failed to heed these warnings.

Therefore, it is respectfully suggested that the appropriate manner to expedite this case is to address the *threshold* issue of mootness immediately. This avoids the considerable time and effort, on the part of the parties and the Court, needed to review the massive record and to brief and rule on issues which should properly be addressed following a decision on the mootness issue.

DATED this 24th day of August, 2009.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: _____

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Mary K. Jaraczski

#2 Railroad Square, Ste. B

P.O. Box 1746

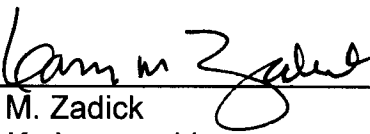
Great Falls, MT 59403

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 24th day of August, 2009.



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Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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DATED this 24 day of August, 2009.


UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

5015-01

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 09-0054

PLAINS GRAINS LIMITED PARTNERSHIP,
Montana limited partnership, et al.,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY, HONORABLE E. WAYNE
PHILLIPS, District Judge,

Respondents.

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

Plains Grains Limited Partnership, a Montana limited partnership, various Montana corporations, organizations, and individuals (collectively Plains Grains) have filed a petition pursuant to M. R. App. P. 14(3), for a writ of supervisory control over District Judge E. Wayne Phillips of the Eighth Judicial District, Cascade County. Plains Grains seeks review of the court's order on motions for summary judgment and a writ of mandamus, a writ of review denying Plains Grains' motion for summary judgment and its application for writs. We issued an order on February 2, 2009, in which we directed Judge Phillips, or his designee, to file a response to Plains Grains' Petition for Writ of Supervisory Control. Judge Phillips directed counsel for defendants and intervenors, Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME), the Estate of Dwayne L. Urquhart, Mary Urquhart, Scott Urquhart, and Linda Urquhart (Urquharts). SME filed a response on behalf of Judge Phillips on February 20, 2009.

At this Court's direction, Plains Grains filed a reply brief on March 23, 2009. SME lastly filed a motion to file the transcript for the February 19, 2009, telephonic status conference. We grant SME's motion to file the transcript of the telephonic conference.

The Urquharts submitted an application for re-zoning to the Cascade County Planning

Department on October 30, 2007. The Urquharts requested that the County re-zone approximately 668 acres of their agricultural land, located approximately eight miles east of the City of Great Falls just south of the Missouri River, from agricultural (A-2) to heavy industrial (I-2). The Urquharts submitted their application for re-zoning for the stated purpose of allowing for the construction and operation of SME's coal fired electric power generating complex, known as the Highwood Generating Station (HGS). The Urquharts had agreed to sell the property to SME before the Cascade County Board of Commissioners (Commissioners) had approved the request to re-zone the land from agricultural to heavy industrial.

The Commissioners approved the re-zoning application, by a two to one vote, subject to 11 conditions offered by SME. Plains Grains filed a complaint and application for a writ of mandate and writ of review against the Commissioners, SME, and the Urquharts. Plains Grains' complaint requested the court to declare void the zone change on multiple grounds, including the fact that the commissioners' action constituted illegal spot zoning. The District Court issued its order on motions for summary judgment and writ of mandamus/writ of review on November 28, 2008.

The District Court first addressed a motion for summary judgment filed by the Urquharts, SME, and the commissioners. The Urquharts contended that the consummation of their sale of the land to SME effectively mooted any spot zoning claim. The court granted summary judgment with respect to Urquharts on this issue, but denied summary judgment with respect to SME, the purchasers of the property, and the commissioners.

The court denied a motion for summary judgment filed by Plains Grains relating to the 11 conditions attached to the approval of the zoning change request and questions of whether the Commissioners adequately considered the planning board's staff report. The court then addressed the writ of mandate and the writ of review filed by Plains Grains despite objections by SME that Plains Grains needed to obtain a stay. The court rejected SME's contention that Plains Grains needed to post a bond before it addressed the writ claims on the grounds that

the requirement of posting a large bond would deprive Plains Grains of its right of access to the courts protected by Article 11, Sec. 16 of the Montana Constitution.

The court deemed the gravamen of Plains Grains' writs request to focus on whether the Commissioners had followed the proper procedure in granting the request for re-zoning. The court also addressed Plains Grains' claim that the Commissioners' approval of the zoning request had constituted illegal spot zoning. The court denied all of these writ requests.

SME and Urquharts filed a motion for entry of judgment on January 7, 2009. SME contended that the court, in its order of November 28, 2008, had denied the relief sought by Plains Grains in its complaint and "thereby disposed of the case in its entirety." SME conceded that the District Court's denial of Plains Grains' motions for summary judgment did not constitute a final judgment on the merits. SME argued, however, that the court nonetheless had disposed of the case in its entirety by denying the relief requested by Plains Grains in its complaint and application for writ of mandate and writ of review. In particular, SME noted that the court had denied Plains Grains' application for writ of mandamus, Plains Grains' application for writ of review, and Plains Grains' applications for peremptory writs. SME argued therefore that the court's ruling on Plains Grains' writ applications had rendered moot the outstanding issues not resolved by the denial of summary judgment. As a result, SME argued that the entry of judgment would be proper.

Plains Grains filed its petition shortly thereafter. SME opposed Plains Grains' Petition for Writ of Supervisory Control on the grounds that the case effectively had ended and that the District Court could enter a judgment from which Plains Grains could appeal. As evidenced by the transcript of the February 19, 2009, telephonic conference, however, it appears that the court is reluctant to act in the face of Plains Grains' pending petition for supervisory control before this Court. The court noted that it is "very reluctant to get into the middle" of the pending petition for a writ of supervisory control.

Counsel for SME, at the same conference, argued that implicit in the court's denial of

Plains Grains' motion for summary judgment on the procedural deficiencies was the notion that the court had "ruled on the voluminous record on the merit." Counsel for SME thus argued that the court's order of November 28, 2008, constituted a final judgment on the merits.

The case now sits in the anomalous position of the District Court unwilling to take further action on the unresolved issues arising from Plains Grains' complaint out of a concern of complicating the potential review by this Court; and this Court hesitant to act due to the matter of the very same unresolved issues before the District Court potentially necessitating a second appeal. Inaction by this Court likely will result in a continuing stand-off that postpones final resolution of the case.

Article VII, Section 2(2) of the Montana Constitution gives this Court general supervisory control over all other courts. This Court may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control constitutes an extraordinary remedy that should be exercised only in "extraordinary circumstances." *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121. Extraordinary circumstances include urgency or emergency factors that make the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist: (1) the other court is proceeding under a mistake of law and is causing a gross injustice; or (2) constitutional issues of state-wide importance are involved; or (3) the other court has granted or denied a motion for substitution of a judge in a criminal case. M.R.App.P. 14(3).

Plains Grains contends that the impending construction of the HGS constitutes an urgency or emergency factor that renders the normal appeal process inadequate. We agree. The combination of the impending construction of HGS and the District Court's professed unwillingness to act render the appeal process inadequate. We also determine that a mistake of law by the District Court on Plains Grains' spot zoning claim would cause a gross injustice in light of the inadequacy of the normal appeal process. As a result, we deem it appropriate

to exercise supervisory control over the District Court to a limited degree.

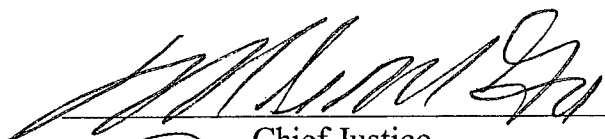
The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment. At that point, Plains Grains can decide whether to appeal and whether to seek a stay of the District Court's final judgment or an injunction pending appeal. Plains Grains first must file with the District Court any request for a stay or an injunction pending appeal. M.R.App.P. 22(1)(a)(i) and (iii). A district court retains jurisdiction to rule on any motion for stay even after the appellant has filed a notice of appeal. M.R.App.P. 22(1)(c). The district court promptly must enter a written order on a motion filed M.R.App.P. 22 and include findings of fact and conclusions of law, or a supporting rationale, that contains the relevant facts and legal authority on which the district court's based its order. M.R.App.P. 22(1)(d). This Court retains the authority to review any decision by the district court regarding the stay of execution of a judgment or the denial or granting of an injunction pending appeal. M.R.App.P. 22(2). Accordingly,

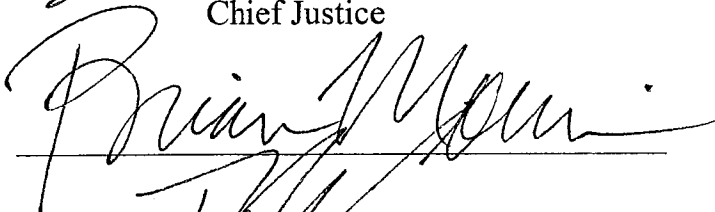
IT IS HEREBY ORDERED that the District Court shall resolve forthwith any remaining claims presented in Plains Grains' complaint;

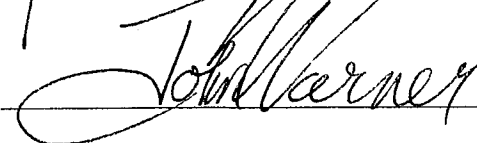
IT IS FURTHER ORDERED that the District Court promptly shall enter a final judgment upon resolution of any remaining claims presented in Plains Grains' complaint.

The Clerk of Court shall mail a copy of this Order to all counsel of record.

DATED this 28 day of April 2009.



Chief Justice




Jin Rice

W. William Bayh

James

Patricia Carter

Justices